BOOK REVIEWS

AN INTRODUCTION TO THE PHILOSOPHY OF LAW. By Roscoe Pound. New Haven: Yale University Press. London: Humphrey Milford. Oxford University Press. 1922. pp. 307.

One type of philosophy of law brings jurisprudence down from the clouds and starry heights to dwell in the homes and by the hearths of men. The other takes it from the earth to the clouds and leaves it there. Dean Pound offers us an introduction to the kind that is willing to dwell among us; but, as Dewey says, it is much harder to introduce a man to philosophy than it is to introduce him to another man. You cannot pass it off with a "pleased to meet you." If the man who is introduced has not already met philosophy, he is not at all sure that he is pleased; and philosophy makes no response at all.

Dean Pound has given us a clear, concise introduction to the philosophy of the law. It is so concise that it is impossible to summarize it so as to give any idea of its wealth of learning. It is as popular in its method of presentation as an introduction to philosophy can be; but many a reading and re-reading will be necessary before one who knows law can understand the philosophy, if it is really his first introduction. This grows out of the very nature of the subject. With the jurists unable to agree upon the essential nature of law, and with the philosophers agreeing that there is no generally received definition of philosophy, the philosophy of law might well seem a hopeless task.

The book begins with a discussion of the function of legal philosophy; from the Greek period, through the Roman and mediaeval, down to the present time. Though usually innocent of any knowledge that it was philosophy that it was invoking, law has always invoked some system of philosophy; in periods of growth, to guide its steps and to justify its departure from beaten paths; in periods of consolidation and quiescence, to justify its inaction. Law has never been able to do without philosophy. In any attempt to grasp the true nature of law, we must get behind the superficial, the formal, the verbal. This is what philosophy is.

The constant struggle of our Anglo-American law to adapt itself to the needs of a rapidly developing civilization whose problems change more rapidly than solutions can be furnished, has prevented any orderly and systematic development of legal principles on the one hand; and on the other, has driven the law of man to invoke the aid of the natural law, the eternal, the omnipresent. The systematic development of Roman law was greatly aided by the fact that civilization was almost stationary for four centuries. Augustus found the eternal city brick and left it marble; Nero swept away the tenements and built his Golden House; the General-in-Chief and leader of the Senate became the Emperor; but the life of the masses was much the same under Theodosius as under Augustus. The legal problems remained, in substance, the same: and the greater number of problems that could come up had arisen and had been settled in an orderly and systematic fashion. If Rome solved her problems more neatly than we have, she had far simpler ones to solve. Yet even Roman law developed from a rather primitive city law into a world law by its appeal to natural law. In both systems the theory of law turned from natural law to the theory of the will of the sovereign, as development by jurists and courts slackened, and legislation took its place. In Rome, the relatively static condition of its civilization made it possible to cling

to the theory of natural law after legislation had in fact become the growing point of the law. In Anglo-American law the continued development of society on the one hand, and the entrenchment of natural law behind constitutional bills of rights on the other, has made the theory of natural rights powerful to check legislative development.

The end or purpose of law is treated next. Primitive society is weak; and primitive law seeks little more than the suppression of the blood feud. As society grows stronger, and as manufacturing and commerce appear, law aims higher and seeks, by rigid rules, to adjust disputes in their inception. When organized society becomes conscious of its own strength, law ventures on the luxury of attempting to do justice. Its first idea of justice is to keep things as they are; its later idea, is to shape things as they ought to be. It is in determining what ought to be that philosophy lends its greatest aid to law; but all too often, the stepping-stone of one generation is the stumbling-block of the next.

The application of law including the finding of law and its interpretation; the blending of interpretation into law-making on the one side, and administration on the other; and the attempt to adjust the ancient feud between the certainty of arbitrary rules and the justice of more or less elastic standards; are next considered. The fact that a rule when applied logically works injustice, means one of two things; either that the rule has been inaccurately stated on premature deductions from incomplete bases, or that it is an attempt to state in definite terms that which from its nature is incapable of being limited by definitions. In the first case it must be restated accurately; in the second, the attempt to state law in the form of rules must be abandoned; or else justice must be sacrificed to certainty. Certain safety valves always exist in every developed or developing system by which some degree of discretion may be exercised; whether avowedly, through administrative boards, or under guise of special remedies, and blending of law and fact together.

The various concepts of liability, property, and contract are next considered: with a brief summary of their historical development, and of the philosophical theories by which they have been supported and justified. These chapters deal with the extension of the idea of liability from specific wrongs, limited by rigid definitions, to the general theory of liability arising from any invasion of that security to which the individual is entitled, and the corresponding revival of liability without fault; the imposition of liabilities growing out of special relations without regard to the will of the party upon whom they are imposed; the theories of the nature of property, and of its acquisition; the extension of the idea of ownership; the relation between custody, possession, and ownership; the change from family ownership to individual ownership; and the gradual reversion to types of group ownership, along with restrictions upon the more extreme types of exercise of individual rights; the nature of contract, at first religious in its origin, and gradually taken over by law as differentiated from religion; its development from certain rigid classes of contract to the broader theories of enforcing promises; the doctrine of freedom of contract; and the growing tendency of our law to give effect to deliberate promises and waivers, without regard to equivalents, bargaining, or consideration.

The book ends with a short but excellent bibliography.

An excellent, impartial and concise presentation of the subject, it leaves us with the uneasy feeling that neither philosophy nor law, nor any combination thereof, has led the way as often as it should to any creative or constructive juristic system. It is the pressure of interests demanding satisfaction, and the roughly empirical balancing of them into a system,

workable even if illogical, that has shaped our society, our government and our law. The sovereign, whether the autocrat or the people, is always given to doing as he will or as he must; leaving to his ministers, jurists and philosophers the task, often much harder, of justifying what the sovereign has done. The constant pull of a desire for certainty and uniformity in one direction, and of justice and righteousness in the other, has made the law move in a path determined by a resultant of these factors. This is the motive power. One of the brakes is the conservatism of man, most extreme in the primitive type; but strong in the modern species. The other is the great mass of the law; worked out by generations of the best intellect that could be secured for the most intellectual of all tasks; too great for any man to grasp, to say nothing of rebuilding from fundamental principles.

But, after all, law is life; and, like all life, it is known by its effects while its essential nature defies analysis.

WILLIAM HERBERT PAGE

THE SUPREME COURT IN UNITED STATES HISTORY. By Charles Warren. Boston: Little Brown and Company. 1922. 3 vols: pp. xvi. 540; x, 551; x, 532.

Success is measured by comparing performance with promise; it is unfair to dwell on what might have been undertaken. The promise of this book is not modest; yet no history of the court's place in jurisprudence is attempted, nor any assessment of the jural value of its decisions; much less an appraisement of its personnel, or a critique of ultimate value. It is a chronological statement of the Court's constitutional labors; with notes on its changing membership and environment, and the counsel who invited, if they did not guide, the more famous decisions. In the words of the preface, it is "not a law-book," but an effort to "correlate in the reader's mind" the work of each term "with the political events in the nation's history."

This promise is great enough: the result an admirable fulfillment for such readers as know the lesser landmarks in our political history. Those however who cannot promptly "correlate" *The Betsy* with Jeffersonian *Sans Culottism*, or *Ex parte Milligan* with The Knights of the Golden Circle, or a long line of early cases with a profound social aversion to wasting money in paying debts, especially to non-resident creditors, — would do well to read McMaster before attempting Warren. The work is novel in plan, most valuable in substance, and in manner excellent; avoiding alike the rose-colored glass of Carson and the poisoned dagger of Myers; while giving for the whole court much of the background so artistically conceived for Marshall by Beveridge.

Mr. Warren has acquired the merit, so hard for a lawyer, of holding no brief for any of the fire-makers to whom the Court gave fuel. From Genet through Burr to Debs, from the Embargo through Slavery to Reconstruction, he adduces contemporary comment from amazingly different sources; but rarely fails to leave the reader to draw his own conclusions. Political pamphlets and oratory, private letters often still unprinted, forgotten legal publications, and above all editorial writing in popular journals, have been dusted off and ranged around a court of imperturable apparent calm. It is a picture interesting and impressive; but the most admiring observer will feel that the judges have maintained such impenetrable reticence concerning their inter-relations, that little is really known of their actual passions or even emotions.